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Constitutional Interpretation and Judicial Review: A Case of the Tail Wagging the Dog

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CONSTITUTIONAL INTERPRETATION AND JUDICIAL REVIEW: A CASE OF THE TAIL WAGGING THE DOG

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A response to John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009).

Professor John Manning's analysis of the Supreme Court's recent federalism decisions works as a platform to further the cause of textualism. His argument fails to persuade, however, because the textualism he says the Court should embrace in federalism cases is antithetical to the atextual nature of the Court's jurisdiction to adjudicate the constitutionality of legislation. Manning prefaces his work by telling readers that his analysis is not an end in itself. His aim, rather, is to "use the methodology" the cases embrace as "a window into the commonalities, if any, between statutory and constitutional interpretation." But Manning's overly programmatic approach does not so much open this portal as close it shut. His insistence that legislative acts and the Constitution are alike is impossible to square with the theory of our written constitution that has prevailed ever since John Marshall and Alexander Hamilton first propounded it: that the acts of a superior must trump those of every inferior authority.

I. TETHERED TO THE TEXT

Manning's perception of discontinuity between the *spirit* of the law the Court embraces in federalism cases and the Court's preference for the *letter* of the law in matters of statutory interpretation is something he does not so much ponder as categorically denounce. He insists that "if the Court's justification for a literal application of statutes is correct," and Manning clearly believes it is, then "there is no meaningful sense in which the constitutionmakers or the constitutionmaking process can be said to have adopted federalism in the abstract." He argues that since statutes and the Constitution are both the product of lawmakers' "hard choices about how to carry out their purposes," the "specific meaning" that they manage to convey concretely, and not their abstract "background justification," must control.

Manning applies this unified theory not only to conflate statutory and constitutional interpretation, but also to condense into one the three commonly acknowledged categories of judicial review. Whether examining

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federalism, separation of powers, or individual rights, Manning explains that to abstract the "freestanding" purpose "underlying specific constitutional provisions" is to adjudicate at "an unhelpful level of generality, one that disregards the specification of means by which its adopters sought to achieve such purposes." Manning's choice of words here is unfortunate. Whether "deriving a generalized right of privacy from various clauses that protect that value" to vindicate the right of married people to purchase contraceptives in Connecticut was helpful is surely a matter of perspective. Manning's condemnation of *Griswold v. Connecticut*[1] in an article devoted to federalism is, moreover, both inapposite and anachronistic. While Manning may not agree with the *Griswold* decision, surely the right to privacy it "embodies" deserves a better hearing than the one sentence Manning allows it. Its authority as *stare decisis* also demands a more thorough treatment.

Professor Gillian Metzger's response to Manning is especially applicable in the context of *Griswold*.[2] She asserts that "Manning's argument is far more destabilizing to existing doctrines and long-established practices of constitutional interpretation than he acknowledges, which . . . counts significantly against it." In his confirmation hearing on September 13, 2005, Chief Justice Roberts felt comfortable discussing *Griswold* and its result because it did not appear "to be an area that is going to come before the court again." He also commented that "[i]t was surprising when it came before the court in 1965." Manning should likewise possess both the good sense to leave well enough alone and the intellectual honesty to train his artillery on the live target of abortion rather than on the dead letter of contraception.

Manning's assault on every variant of constitutional decision-making not strictly tethered to a specific textual provision is impossible to square with his claim that he "does not seek to consider whether the new federalism decisions are ultimately 'right' or 'wrong' in some sense, but rather [he seeks] to see what light they might shed on the use of purposive abstraction in constitutional adjudication." His repudiation of *Griswold* and his embrace of Justice Scalia's scathing dissent in *Boumediene v. United States*[3]—in which Scalia criticizes the "general 'separation-of-powers principles' dreamed up by the Court"—reveal that Manning's across-the-board defense of the letter of the law is a normative argument. And as a normative argument, it implodes.

II. THE ATEXTUAL NATURE OF JUDICIAL REVIEW

Metzger also observes that "compromise simply cannot shoulder the analytic work Manning assigns to it." This deficiency is symptomatic of a much larger and more intractable problem. What Manning calls "constitu-

1. Griswold v. Connecticut, 381 U.S. 479 (1965).

2. Gillian E. Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. F. 98, 99 (2009).

3. 129 S. Ct. 2229 (2008).

tional interpretation" is a euphemism that allows him to ignore the fact that judicial review—the only possible vehicle for constitutional interpretation, however pursued or accomplished—is "nowhere defined or even mentioned in the [Constitution] itself."[4] Scholarship confirms that judicial review is as freestanding a concept as the federalism Manning denounces. As Professor Alexander Bickel states at the outset of his rightly celebrated book, *The Least Dangerous Branch*, judicial review "cannot be found" in the Constitution, but rather it has somehow been placed there. Professor David Strauss more recently asserts that even those with the most divergent views on the constitution agree that judicial review is an abstract principle that cannot be tied to any specific constitutional provision.[5] The Founders likewise believed that judicial review is at best a logical inference. In *Cohens v. Virginia*, Chief Justice Marshall opined that the "judicial power of every well constituted government must be coextensive with the legislative, and must be capable of deciding every judicial question which grows out of the Constitution and laws."[6] Alexander Hamilton, in *The Federalist No. 80*, writes that there must "be a constitutional method of giving efficacy to constitutional provisions," and that "the propriety of the judicial power of a government" must be "coextensive with its legislative [power]."

If, as the weight of authority suggests, judicial review cannot be tied to the letter of the Constitution, the logical conclusion of Manning's argument is that judicial review should not exist. And, absent judicial review, any talk of constitutional interpretation, to quote Manning quoting Justice Scalia in *Boumediene*, is "nonsensical." Professor Metzger again hits the mark in observing that Manning's argument "boils down to a claim akin to the maxim that the specific trumps the general—though for Manning the general ends up wholly obliterated." Manning's individuated thrusts on the spirit of constitutional interpretation are parried in the aggregate by the determining force of judicial review, which—it is no exaggeration to say—floats like a butterfly but stings like a bee.

III. COMMONALITY DEBUNKED

Manning's myopia—his inability or unwillingness to see the constitutional forest through the legislative trees in pursuit of "commonalities"—is evident throughout his analysis. He fails to distinguish the singular focus of statutory interpretation, where only the meaning of a legislative act is at issue, from the duality of constitutional interpretation, where an act's very existence hangs in the balance. Judicial review is a high stakes game of "in-

4. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 1 (Yale Univ. Press 1986) (1962).

5. David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 859 (2009).

6. 19 U.S. 264 (1821).

cluded identity or excluded difference:"[7] if the act cannot be incorporated within the Constitution, it is deemed repugnant and held void. The core principle of judicial review is that the Constitution's generality trumps a statute's specificity. As Marshall asserted in *Marbury v. Madison*,[8] "[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." "To what purpose," he asks, "are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained?" If legislation excluded by the Constitution does not confine the legislature, and if what is proscribed nevertheless "bind[s] the courts and oblige[s] them to give it effect," then the Constitution, "established in theory," would be "overthrow[n] in fact . . . an absurdity too gross to be insisted on."

The fact that statutory interpretation at times entails the examination of multiple statutes only further highlights the fundamental difference between statutory and constitutional interpretation. In *The Federalist No. 78*, Hamilton explains that when two statutes clash and cannot be reconciled, the applicable "rule of construction" is that "the last in order of time shall be preferred to the first." However, when a statute clashes with the Constitution, the order must be reversed and the "converse of that rule" adopted. "The nature and reason of the thing" require that "the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former." These manifest differences between statutory and constitutional interpretation suggest that the commonality Manning prefers can only be achieved if judicial review is abolished and legislation allowed to rule supreme. Only in the alternative Marshall long ago rejected can Manning's theory prevail.

Marshall succinctly refutes Manning's commonality claim by asserting that either "the [C]onstitution controls any legislative act repugnant to it; or, that the legislature may alter the [C]onstitution by an ordinary act." Furthermore, Marshall maintains that "[b]etween these alternatives there is no middle ground." If the Constitution "is on a level with ordinary legislative acts," then "like other acts, [it] is alterable when the legislature shall please to alter it." If this is true, then legislative power is inherently "illimitable," and "written constitutions are absurd attempts, on the part of the people, to limit [legislative power]." So long as the road block of judicial review—divorced from positive law and exclusively attributable to "the essence of the judicial duty" in what Hamilton expressly characterizes as an "exercise of judicial discretion"—remains the operative mode of constitutional enforcement, Manning's argument for literal constitutional construction must dead-end against it.

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7. Michael Halley, *Thoughts on the Churn Law*, 104 NW. U. L. REV. COLLOQUY 132, 144 (2009).

8. 5 U.S. 137 (1803).

While sharply critical of how the Court abstracts a freestanding federalism "from specific provisions spread throughout the entire document," Manning ignores the fact that Marshall followed an identical procedure in *Marbury*. Marshall builds the general framework of judicial review from specific provisions that, he asserts, do not so much establish as "serve to illustrate this subject." Or as Metzger describes the fabrication, "Marshall derived the power of judicial review from general understandings of the judicial function and the nature of a written constitution, along the way referencing the Supremacy, Arising Under, and Oath Clauses." Manning criticizes the Court's determination to ground its anticommandeering doctrine on the "general background value of 'dual sovereignty.'" Justice Scalia's reasoning in *Printz v. United States*,[9] however, is entirely consistent with Marshall's inference of judicial review. Such extrapolations provide the only juristic grounds for constitutional interpretation in America. If Manning believes otherwise, he should take aim at the truth of judicial review rather than at its interpretive consequences.

Manning's failure to reconcile his criticism of Justice Scalia's *Printz* opinion, which endorses a freestanding federalism, with his approval of Justice Scalia's *Boumediene* dissent further detracts from his unified theory. While Manning is free to argue for an extension of textualism past the limits imposed by the Court's most influential, articulate, and nuanced textualist, he should not do so without endeavoring first to understand and to explain why all the Court's most conservative Justices have consistently declined to take the obvious next step Manning proposes. Absent this undertaking, Manning's method amounts to little more than ad hoc cherry-picking of convenient cases, which does nothing so much as underscore the differences between the various strains of judicial review that Manning seeks to bundle together.

IV. Judicial Review's Origins Lie in Freestanding Federalism

The deficiency in Manning's analysis becomes even clearer when one appreciates that the abstract federalism Manning rejects formed the basis from which Hamilton and Marshall first invented the expedient of judicial review. While dual sovereignty is all well and good, "[t]hirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed," says Hamilton in *Federalist 80*. Hamilton further asks "[w]hat, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them?" This general assertion of jurisdiction cannot be credibly interpreted to encompass only the very few limitations that the Constitution expressly enumerates.[10] And while Manning is confident that "the *fact* of

9. 521 U.S. 898 (1997).

10. *See* Michael Halley, *La Vie en Rose: Jeremy Waldron and Richard Fallon's Meander Through the Wonderland of Judicial Review*, 2009 Cardozo L. Rev. de novo 218 (2009).

compromise" is sufficient to bind the states, he ignores the additional fact that Marshall grounded judicial review in the assumption that the states never bargained in good faith and cannot be trusted to keep their word. Observing in *Cohens* that "[w]e have no assurance that we shall be less divided than we have been," Marshall relied on the same Founders' background expectations that Manning eschews to conclude that:

> There is certainly nothing in the circumstances under which our Constitution was formed; nothing in the history of the times, which would justify the opinion that the confidence reposed in the States was so implicit as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union.

Hamilton and Marshall make it further abundantly clear that the inference of judicial review is preferable to any express constitutional enforcement provision. In *Federalist 80*, Hamilton asserts that either "a direct negative on the State laws," or "an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union" will do the trick. He favors the latter because he presumes it will be "most agreeable to the states." And while he goes on to say (in apparent justification) that this option "appears to have been thought by the convention preferable to the former," he proffers no evidence to that effect. Marshall, for his part in *Cohens*, rests the practice of judicial review of state action on nothing more substantial than the fact that "[c]ourts of justice are the means most usually employed" to secure compliance with the laws, and that it is "reasonable to expect that a government should repose on its own Courts, rather than on others."

If Manning truly agrees with the Court that "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers,"[11] then he should follow that principle to its logical conclusion and reject judicial review of legislative or executive authority. However clearly the text of the Constitution may circumscribe the authority of the States, the President, and Congress, it contains nothing that affords the judicial branch a general power of superintendence and enforcement.

11. Buckley v. Valeo, 424 U.S. 1, 124 (1976).